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Workmen's Compensation—Prerequisites to Indemnity under Longshoremen's and Harbor Worker's Act

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examination was conducted by the board's impartial panel of chest examiners. Subsequently, at hearings in 1956, the doctor relied on in the 1944 proceedings admitted that his 1944 diagnosis had been wrong and that he was now convinced that claimant had been totally disabled at that time. (The doctor's 1954 opinion was based upon a re-examination of 1944 X-rays and other records.) At the 1956 hearing, the Board awarded claimant compensation based upon the finding that there had been total disability as a result of silicosis in 1944.

The Appellate Division unanimously reversed and dismissed the claim, basing its decision on Section 123.[36]

The Court of Appeals in a 4-3 decision, reversed and held that in reopening the case in 1954 the Board was merely reconsidering its previous denial of an application for rehearing made less than seven years after the accident.[37] The precedent relied on by the Court was *Roder v. Northern Maytag Co.*[38] In *Roder* the claim was first disallowed by the Board on the ground that claimant had failed to establish a causal connection. A month before Section 123's seven year period expired, an application to reopen the case was made, and this was denied just after the expiration of that period. One week later, a motion for reconsideration or reargument was made, and the Board rescinded its denial of the previous week and noted that it was reconsidering the previous application for rehearing which had been filed within the seven year period. The Court of Appeals affirmed this determination.

In *Stimburis,* the majority indicated that its decision necessarily follows from *Roder.* However, the dissent *per* Judge Fuld, considered the resemblance between the two cases to be only superficial. In *Roder,* the second application for a rehearing was filed just one week after the board's denial of the previous application, while in *Stimburis* the second application was made ten years after the first.

The *Stimburis* decision writes even more of an exception into Section 123 than *Roder* did, and it would seem that the dissent's fear of *Stimburis* construing the section out of existence is justified. The Board is given the power to reopen a claim at any time, provided only that the initial request to reopen was made some-time within the seven year period. This could be used to circumvent the finality policy adopted by the legislature.

PREREQUISITES TO INDEMNITY UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The statutory immunity given by the Longshoremen's and Harbor Workers' Compensation Act to an employer from common law tort liability to an employee, and the "right-over" against an employee's recovery from a negli-

36. 5 A.D.2d 209, 171 N.Y.S.2d 153 (3d Dep't 1958).
37. N.Y. WORKMEN'S COMP. LAW § 38 provides that the disablement of an employee resulting from an occupational disease shall be treated as the happening of an accident.
38. 297 N.Y. 196, 78 N.E.2d 470 (1948).

gent third party,[39] create an unjust situation in instances where the employer and a third party would be joint-tortfeasors at common law. Common law contribution of indemnification between joint-tortfeasors is based upon the parties being jointly liable to the injured party. The Longshoremen's Act specifically provides that the employer is not liable to his employee in tort. As a result of this factor, the third party could be denied either contribution or indemnification. To make the situation even more unjust, the employer's "right-over" allows him to be made whole as to any liability imposed under the act where a recovery is had against a third party.[40]

Both the New York and the Federal courts have recognized the injustice of this situation and have attempted to take the sting out of the immunity granted to the employer, whenever possible. However, since the employer is immune from any other liability "on account" of the injuries to an employee, the courts have had to procede on theories other than tort in order to impose this additional liability.[41]

The New York courts in interpreting the analogous New York Workmen's Compensation Law have relied upon a theory of quasi-contract or implied-contract. This is to say, that where an employee has been injured as a result of the active or primary negligence of his employer and the secondary or passive negligence of a third party, the employer would be unjustly enriched if he were allowed immunity from common law liability at the expense of the third party.[42] In *Westchester Lighting Co. v. Westchester County Small Estates Corp.*,[43] arising under the New York Workmen's Compensation Act, the Court found an implied-contract of imdennification to protect the "innocent" third party. This "contract" was implied in law on the basis of equitable principles designed to prevent unjust enrichment.

In *McFall v. Campagnie Maritime Belge*,[44] the New York Court of Appeals, exercising its concurrent jurisidiction under the Longshoremen's Act, had an opportunity to decide a case factually similar to the *Westchester* case, arising under the Federal statute. The New York Court applied the quasi-

39. Section 1, 44 Stat. 1424 (1927) *as amended*, 33 U.S.C. § 901 *et seq.* (1952). Section 905 provides: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer, . . . on account of such injuries or death . . . ." Section 933 provides: "that an injured employee may elect to receive compensation from his employer or to recover damages against some person, other than the employer, who is liable to the employee in damages." Section 933(b) provides: "Acceptance of such compensation under an award in a compensation order . . . shall operate as an assignment to the employer of all rights of such person entitled to compensation to recover damages against such third person."

40. For a complete discussion of this problem see Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. PA. L. REV. 321 (1954).

41. See Slatter v. Marra Bros., 186 F.2d 134, 139, (2d Cir. 1950).

42. N.Y. WORKMEN'S COMP. LAW § 11 provides: "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, . . . on account of such injury or death . . . ." *cf.* LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT, § 933, *supra* note 39.

43. 278 N.Y. 175, 15 N.E.2d 567 (1938).

44. 304 N.Y. 314, 107 N.E.2d 463 (1952).

contract theory and held that a shipowner had a "contractual" right to indemnity arising by operation of law where the shipowner was held liable to an injured workman, provided that the shipowner's negligence was only secondary or passive while the employer's negligence was the primary or active cause of the employee's injury. This was the first time that the implied-contract theory was used to impose liability on an employer covered by the Longshoremen's Act.

This past term, *Merriweather v. Boland & Cornelius*,[45] allowed the New York Court of Appeals to reexamine the implied-contract theory of *McFall*, and its application under the Federal Statute in light of Federal decisions rendered subsequent to the decision in *McFall*.

In *Merriweather*, the Appellate Division had dismissed the shipowner's third party complaint on the ground that the complaint charged that the employer and shipowner were in *pari delicto* and thus there was no basis for indemnity.[46] The Court of Appeals concluded that the complaint stated facts sufficient to support recovery under either an express or implied contract, and reversed the Appelate Division's dismissal of the complaint. Judge Froessel, speaking for the Court proceeded to reexamine the *McFall* decision in the light of three recent United States Supreme Court decisions: *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*,[47] *Weyenhauser S. S. Co. v. Nacivena Co.*,[48] and *Crumady v. Joachime Hendrik Fisser*.[49]

None of these decisions expressly rejected the implied-contract theory of *McFall*, however, the Supreme Court restated that under the Longshoremen's Act the employer was immune from liability arising "on account" of the injuries to an employee, and reiterated the necessity of finding some other basis before an employer could be held liabile to indemnify a third party. Each of these cases involved claims of indemnity by a shipowner against an employer whose employee was injured while performing stevedoring services aboard ship. In each of these Supreme Court decisions the Court went to great lengths to find an express contractual relationship existing between the employer and the shipowner, directly or as a third party beneficiary. Having once found some actual contractual relationship, the Court proceeded to find express or implied terms in that contract which obligated the employer to indemnify the shipowner.

In the *Merriweather* case, the Court of Appeals recognized that the Supreme Court's requirement of an express contractual relationship was an implied rejection of the *McFall* quasi-contractual theory. Since the Longshoremen's Act is a Federal statute it must be applied in accordance with the Federal law. Therefore, the Court of Appeals specifically overruled its own

45. 4 N.Y.2d 417, 190 N.Y.S.2d 65 (1959).
46. 7 A.D.2d 618, 179 N.Y.S.2d 678 (4th Dep't 1958).
47. 350 U.S. 124 (1955).
48. 355 U.S. 563 (1957).
49. 358 U.S. 423 (1959).

decision in the *McFall* case and sustained the third party complain in *Merriweather* on the sole basis of the allegation of an express contract between the shipowner and the employer.

The decision in this case points up the necessity for parties dealing with employers covered by the Longshoremen's Act to be certain that their transactions are evidenced by a valid and enforcable contract. For the benefit of such employers and parties dealing with them, it is desirable that such a contract contain express terms covering the employer's duty to indemnify against damages paid to an injured employee.

STATE RETIREMENT SYSTEM: FINALITY OF COMPTROLLER'S DETERMINATION OF NATURE OF ACCIDENT

Section 61 of the Retirement and Social Security Law provides that an "accidental death benefit" shall be payable upon the death of a member of the New York State retirement fund if the Comptroller shall determine that he died before the effective date of his retirement "as the natural and proximate result of an accident sustained in the performance of duty." In *Croshier v. Levitt*,[50] the decedent, 57 years of age, had been a forest ranger for the State Conservation Department. His death was caused by a heart attack while fighting a forest fire. He had a history of heart trouble for which on one previous occasion he had been hospitalized.

The decedent's widow, claiming that his death was the result of an accident, applied for the benefits allowed under Section 61. The Comptroller rejected the claim on the ground that decedent's death was not due to an accident. The Appellate Division annulled the Comptroller's determination,[51] and this appeal was taken. The Court of Appeals reversed in a 4-3 opinion, holding,

> the mere fact that the medical and physiological facts are not seriously in dispute does not convert the ultimate issue of whether the death was "the natural and proximate result of an accident" into a pure question of law on which this Court has the final word.[52]

Section 74 of the above Act gives the Comptroller "exclusive authority" in determining all applications for such a benefit.[53] The problem is, what did the Legislature mean by "exclusive authority"? Does this allow the Comptroller to establish a definition of accident for purposes of this Act or is he bound by the standards used in similar fields such as Workmen's Compensation? It is significant to note, as did the majority in this case, that in *Nash v. Brooks*,[54] it was held that an Industrial Board determination of accidental injury in a Workmen's Compensation proceeding was to be binding upon the medical board of the Retirement System. The Legislature changed this result

50. 5 N.Y.2d 259, 184 N.Y.S.2d 321 (1959).
51. Croshier v. Levitt, 5 A.D.2d 941, 172 N.Y.S.2d 344 (3d Dep't 1959).
52. Croshier v. Levitt, *supra* note 50.
53. N.Y. RETIREMENT AND SOC. SEC. LAW § 74.
54. 276 N.Y. 75, 11 N.E.2d 545 (1937).